

THE HIGH COURT

FAMILY LAW

[2022] IEHC 744

RECORD NO. [2022/10M]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW
REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT**

1995

BETWEEN/

F.B.

APPLICANT

AND

D.B.

RESPONDENT

JUDGMENT OF Mr. Justice Jordan delivered on the 31st day of May 2022.

1. This is an application for a decree of judicial separation and ancillary relief pursuant to the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act 1995.
2. The applicant and the respondent were married in 1973. They have three children – two girls and a boy - all of whom are adults and making their way independently in life.
3. Both the applicant and the respondent are 74 years of age.
4. The family business involves a company which was incorporated in 1977. It has grown steadily since then with some setbacks – most recently during and after the financial crisis of 2008/2009. In recent years, the company has grown significantly and

is doing well. The Court is satisfied that the current strong position and success of the business is due largely to the effort and industry of the adult son of the parties who became involved in the business some years ago on his return from overseas. He has modernised and grown the company in a niche market where it is well regarded and competent. It must also be acknowledged that the respondent has been a part of this process. He has a vast experience and an intimate knowledge of the business.

5. The family home of the parties is held in the joint names of the parties and is free of encumbrances. It is an attractive and spacious house in a sought-after location.

6. The proceedings commenced in August of 2018. The defence and counterclaim were delivered in January 2019.

7. There were issues between the parties concerning financial disclosure and vouching but the case was ultimately listed for hearing in the Circuit Court on 05 October 2021. The Judge allowed time outside the Court to facilitate the parties engaging in without prejudice settlement negotiations and to allow the applicant's legal representatives to speak with certain witnesses who had been subpoenaed – and to ascertain the documentation which they had brought with them.

8. The case did not settle but the respondent did make an open offer to the Court, the terms of which were included in a letter dated 05 October 2021 which was sent by the respondent's solicitors to the applicant's solicitors.

9. A successful application was made on 06 October 2021 by the applicant to adjourn the matter - with a view to bringing motions for non-party discovery against certain third parties. The contents of the open letter were forcefully recommended to the Circuit Court on behalf of the respondent. The applicant's position was that until proper disclosure was made, she could not respond to the open offer.

10. On 14 January 2022 an order was made on consent in the Circuit Court transferring the case [and the related divorce proceedings] to the High Court. The Court order refers to the transfer being made “on the basis of Circuit Court Costs”.

11. Although motions for discovery did issue, they were not proceeded with. The applicant pressed for and did receive additional information and vouching documentation prior to the commencement of the hearing in the High Court which satisfied her legal team in respect of discovery - to the extent that the motions were not pursued.

12. The terms of the open offer were confirmed in a letter from the respondent’s solicitors dated 21 December 2021. By letter of 07 February 2022 the open offer with some minor changes was reiterated.

13. The applicant replied to the open offer by letter dated 20 April 2022.

14. On Tuesday 03 May 2022 during the hearing two further open letters concerning settlement passed between the parties.

15. For completeness the “open offer correspondence” is contained in the first schedule attached to this judgment. The open offer correspondence comprises of a letter dated 05 October 2021 from the respondent’s solicitors to the applicant’s solicitors, a letter dated 21 December 2021 from the respondent’s solicitors to the applicant’s solicitors, a letter dated 07 February 2022 from the respondent’s solicitors to the applicant’s solicitors, a letter dated 20 April 2022 from the applicant’s solicitors to the respondent’s solicitors, a letter dated 22 April 2022 from the respondent’s solicitors to the applicant’s solicitors, a letter dated 03 May 2022 from the applicant’s solicitors to the respondent’s solicitors and a letter dated 03 May 2022 from the respondent’s solicitors to the applicant’s solicitors.

16. The case was listed for hearing (scheduled for four days) on Tuesday 26 April 2022. Much of that day was occupied by without prejudice settlement negotiations outside Court.

17. The case did not settle and the evidence commenced on Wednesday 27 April 2022 and continued on Thursday 28th and Friday 29 April 2022. The hearing resumed on Tuesday 03 May 2022 and concluded with oral submissions on behalf of both sides on the afternoon of Wednesday 04 May 2022.

18. It is extremely difficult to understand how or why this case has occupied such hearing time in the High Court in circumstances where the respondent's approach has since 05 October 2021 essentially been that there should be a sale of all of the main assets and a division of the proceeds 50/50 between both parties.

19. It may be unreasonable not to allow some time to pass after 05 October 2021 for pursuit of discovery and further disclosure – and for informed consideration of the open offer. The applicant might also argue that there were still some loose ends in relation to the company affairs and financial matters current at and just prior to the time of hearing. The Court is however satisfied that any such issues were not insurmountable or critical matters in the overall context.

20. The company is a family business now largely in the hands of the second generation [the son] in terms of the day-to-day business. The respondent remains involved - and with this package comes some degree of confusion concerning expenses, entitlements and drawings. However, there is no persuasive evidence of any male fides or aggrandisement by the respondent at the expense of the company. Rather a picture emerges of the respondent working in recent years at his own pace as an older and valuable part of the team but without having a proper salary structure in place.

21. A reasonable period of grace to allow engagement in a meaningful and constructive way concerning the open offer had clearly passed before the hearing date of the 26 April 2022.

22. The late response to the open offer dated 20 April 2022 - and the reply to that of 22 April from the respondent's solicitors - suggested that there was little in reality between the parties although they did not agree on everything. The timing of the sale of the family home was however particularly contentious.

23. As the case did not resolve, the hearing proceeded.

24. There was a hotly contested issue concerning the yacht which the respondent wishes to hold onto without any monetary adjustment in favour of the applicant – and likewise in respect of his prestige car. The applicant values the yacht at €100,000.00 and the car at €70,000.00. The respondent values the yacht at €55,000.00 [or approximately €60,000.00 in his most recent affidavit of means] and the car at €35,000.00. There was some evidence in relation to the purchase prices given by the parties but the evidence concerning the current value of the yacht and the prestige car was unsatisfactory. The main evidence in relation to the yacht valuations on both sides was in written form. The “Countertop” valuation of the yacht is an unimpressive document whereas the valuation dated 08 April 2022 is at least a signed valuation by a person apparently knowledgeable in the area and familiar with the yacht. The Court was provided with “Done Deal” comparisons – or another “Countertop” valuation - in relation to the prestige car.

25. Having regard to the evidence heard, the Court considers the applicant's valuations of the yacht and the car to be excessive. The respondent's evidence concerning the valuation of both is more persuasive, although the Court considers the respondent's valuations a bit light. The Court will place a value of €70,000.00 on the

yacht and a value of €50,000.00 on the car. The combined value of both on this basis is €120,000.00. If the applicant was entitled to 50% of their value, that would give her €60,000.00 in respect of those assets.

26. Thus, it must be said that a dispute concerning the entitlement to a 50/50 split of the value of the yacht and the prestige car is petty in the overall scheme of things - and having regard to the evidence heard. It did not, without more, justify a four/five-day hearing in the High Court.

27. In so far as the prestige car is concerned, the Court does accept that the respondent does use it for company travel albeit with significant personal use also.

28. It is the position that the applicant received an inheritance from her brother on or about the 29th of October 2021 of €36,330.72 [net after payment of Inheritance Tax]. It was lodged to a bank account in her name on 11 November 2021. This inheritance was not disclosed by her until shortly prior to the hearing in the High Court.

29. On behalf of the respondent, it was pointed out that the yacht was purchased with the assistance of an inheritance which the respondent had received from his brother and which allowed him to put €50,000.00 towards the acquisition costs. The evidence was that the respondent has had boats since he was 17 and had traded up when acquiring this yacht. He said he did not smoke or drink and his yacht/sailing is and has been his hobby throughout his life. He did not regard the yacht as a luxury item.

30. It was put to the applicant in evidence that it would seem fair that the respondent would keep the yacht and she would keep her inheritance. The answer by her to that question in cross-examination was that that would be okay.

31. Some time was taken up with monies expended by the respondent on a tender or dingy and on berthing fees which it was alleged should not have been paid for in the way they were - and which expenses had depleted the matrimonial funds. Again, these

were inconsequential issues in the overall context and a sensible approach would have let them drop. The Court is not prepared to order any add-backs by the respondent notwithstanding the applicant's contention that a sum of €7,500.00 and a sum of €3,000.00 ought to be paid back by the respondent to the bank accounts.

32. Time was spent concerning certain "expenses" paid on behalf of the respondent by the company and the treatment of these payments in the company accounts. Of note in this regard is the fact that in the open offer dated the 5th of October, 2022 the respondent proposed as a term of the settlement of the proceedings the following: –

"5. It is acknowledged by the applicant that the company is tax compliant. However, it is hereby agreed that the respondent shall indemnify the applicant against any revenue claim that may arise relating to the company."

The applicant now seeks provision in the Court order for such an indemnity. The Court is not persuaded that it ought to include such a broad provision in the Court order.

33. The company has its own accountants. They are no doubt alert to their obligations concerning the respondent's receipts, benefits or expenses received by him from the company and accounting properly for same in the company accounts and in so far as any revenue liability is concerned. Given the nature of the family business the Court is not convinced that any indemnity ought to be provided for in the Court order.

34. Much time was spent in the hearing with evidence concerning the value of the company and family business. In this regard, Mr. P. gave evidence on behalf of the applicant concerning the valuation and Mr. M. gave evidence on behalf of the respondent.

35. Ms. W. also gave evidence on behalf of the applicant. She prepared a financial report for the applicant in relation to the assets and liabilities detailed in the D v D schedule.

36. On the applicant's side, the company is valued at €4,152,000.00 - or net (after selling costs and capital gains tax) €2,945,000.00. On the respondent's side, the company is valued at €1,800,000.00 or €1,462,400.00 after provision for capital gains tax.

37. Given the disparity in valuations it is very clear that Mr. P. and Mr. M. have very different views as to what the company is worth. Ultimately, what it is worth will be determined on sale. The evidence of Mr. P. and Mr. M. highlighted the fact that valuing the company is very far from an exact science and the ultimate test of the value of the company is the price which it achieves on sale.

38. The Court has considered the evidence and the reports of Mr. P. and Mr. M. concerning the value of the company. It remains to be seen what sale price the company will achieve.

39. The Court does however consider the approach to valuation of Mr. P. (5-8 times future maintainable profits or "FMP") to be overly optimistic (and leaving to one side for the moment the uncertainty which the range of 5-8 itself illustrates). Taking the apparent best case scenario of €519K X 8 = €4,152,000.00 as representing the value of the company as the applicant has done in the D v D schedule appears unrealistic. The Court considers that this approach to the valuation of this family company does not have sufficient regard for the fact that the son of the applicant and respondent is in effect running the company, has been largely responsible for its expansion and success over recent years and is clearly a "key man" in the business. Furthermore, it is clear from the evidence that there is nothing to prevent him setting up on his own in competition to the family company and bringing some or all the employees and customers and suppliers with him – apart perhaps from any loyalty he feels to his parents and to the company.

40. Mr. P. fairly conceded in his evidence that if the son and the current employees walked out in the morning there would not be a business.

41. The Court has had regard to the evidence given by Mr. M. and his report concerning the value of the company. In arriving at his valuation of the company, he has used the future maintainable profits approach, but he has used a multiple of 4x based on the size of the company, historical performance of the company, the managements operation of the company and his professional judgment and knowledge of the current market. His multiple was applied to a weighted average future maintainable profit of €324,967.00 which he calculated by looking at the company's three most recently filed financial statements, the final draft financial statements for the year ended 31st of December, 2020. In arriving at the weighted average, he made the following adjustments: -

- (1) A market adjustment of €25,000.00 to the son's salary to bring it in line with industry salaries for an equivalent managing director.
- (2) A pension adjustment to reflect pension contributions for the son to bring them in line with industry salaries for an equivalent managing director.
- (3) A rent adjustment of €35,000.00 to reflect the estimated market rate should the company be required to pay rent (if it is occupying the property belonging to the respondent).
- (4) An exceptionally large depreciation charge in 2017.

42. Mr. M's valuation of the company is between €1.8m and €1.83m based on the future maintainable profits approach.

43. For completeness, Mr. M. also considered possible outcomes using the liquidation approach and arrived at a value between €1.32m and €1.53m.

44. In Mr. M's opinion, the valuation of the equity of the company on an ongoing concern basis is €1.81m.

45. The Court considers the approach of Mr. M. to be more realistic than that of Mr. P. It is necessary to observe also that an overly optimistic valuation of this family company may well be inimical to the interests of the applicant and of the respondent.

46. The Court did consider granting a decree of judicial separation and directing a sale of the company and of the warehouse from which it operates – and adjourning the making of further orders concerning provision until the sale is complete. Such an approach would have the attraction of knowing precisely the value of the company before making orders concerning the financial issues in dispute between the parties. The Court's jurisdiction to do so was questioned by the respondent. The Court is not persuaded that it does not have jurisdiction to proceed in that manner in an appropriate case. However, the Court is persuaded that it would be inappropriate to adopt this approach in this case not least because of:-

- a. The desire for finality and expedition.
- b. The age of the parties.
- c. The fact that these proceedings commenced in 2018.
- d. The fact that the Court believes that the placing of the company on the market for sale pursuant to the Court order which the Court intends to make will protect the interests of the parties just as well as any other approach would.
- e. The fact that the Court has heard the evidence in the case to conclusion and ought therefore decide the case and make the appropriate orders in the interests of justice.

47. It is appropriate that the Court set out Section 16 of the Family Law Act, 1995 and detail its findings in respect of the matters recited in Section 16(2).

48. Section 16(1) of provides that: -

“In deciding whether to make an order under section 7, 8, 9, 10 (1) (a), 11, 12, 13, 14, 15A, 18 or 25 and in determining the provisions of such an order, the court shall endeavour to ensure that such provision exists or will be made for each spouse concerned and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case.”

49. Section 16(2) goes on to provide that: -

“Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters—”

“(a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future.”

The applicant and the respondent are 74 years of age and the “matrimonial assets” are as set out in the D v D schedule. They are both in receipt of state pensions and the respondent has a private pension also. The respondent does have some earning capacity in that he is still working at times for the family business on the basis already mentioned in this judgment. He is no doubt an asset to it because of his knowledge of the business, its customers and suppliers. However, he is at this stage of his life entitled to be retired and to enjoy the fruits of his labour. It would be wrong to attach any real weight to whatever income or earning capacity he has by reason of his involvement in the family business which will in any event be placed on the market for sale. Whether or not he has

any involvement with the company and business after the sale concludes is uncertain.

The applicant does not have any earning capacity at this stage of her life and depends upon her pension and the accumulated financial resources which she is entitled to a share of. She too is entitled to enjoy the fruits of her lifetime of hard work in retirement.

“(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise).”

Both the applicant and the respondent need enough money to secure suitable and comfortable accommodation and to provide for their daily needs as they grow older as senior citizens.

“(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be.”

The applicant and the respondent appear to have enjoyed a comfortable but not extravagant lifestyle. It is the position that the respondent appears to have enjoyed frequent holidays in recent years (where the yacht is moored) and time in another location in Ireland where he has an acquaintance. His lifestyle was more lavish than that of the applicant and that does appear to be due in part at least to the fact that his financial resources were better than the applicants.

“(d) the age of each of the spouses and the length of time during which the spouses lived together.”

As already stated, the applicant and the respondent were married in 1973 and they are both 74 years of age. They both reside together in the family home but unhappy differences have existed since 2018, and indeed prior to then. Their lives have been separate for several years. However, theirs was a marriage of long duration.

“(e) any physical or mental disability of either of the spouses.”

Both the applicant and the respondent have not insignificant health issues although they do both appear well at present. That said, their respective health concerns and need for care in the future – and the resources to pay for same – are pertinent. The health concerns are also another reason for expedition and finality.

“(f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family.”

This was a successful marriage in which there is an offer by the respondent to approach the division of assets on a 50/50 basis in essence. Both parties are 74. It is not therefore necessary to dwell on the above consideration.

“(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.”

Likewise, insofar as this consideration is concerned.

“(h) any income or benefits to which either of the spouses is entitled by or under statute.”

Both spouses are in receipt of the Old Age Pension.

“(i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it.”

No case has been made under this heading and it need not be dwelt on.

“(j) the accommodation needs of either of the spouses.”

The accommodation needs of both spouses does require consideration. The status quo is to continue pending a sale of the dwelling house. A sale of the dwelling house and a division of the proceeds of sale will entitle both the applicant and the respondent to secure suitable and appropriate accommodation – albeit smaller than the current family home and perhaps in a slightly less expensive area.

“(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of judicial separation concerned that spouse will forfeit the opportunity or possibility of acquiring.”

The Court will divide the private pension of the respondent 50/50 between the applicant and the respondent. That is fair in circumstances where the respondent has no private pension.

“(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.”

This does not arise.

50. The parties did make written submissions concerning the appropriate Court orders and they have indicated areas of agreement and disagreement – with submissions concerning the areas of disagreement. The Court has considered all the submissions made. The Court desires to structure the Court order in a way which will help achieve fairness, finality and clarity - and hopefully lessen reasons for conflict between both sides going forward. The parties at their stage in life deserve an end to litigation - if at all possible.

51. A particularly contentious issue has been the applicant’s insistence that the company be sold [the sale documents for completion of the sale be executed] before the family home is placed on the market for sale. The open offer correspondence details the position of each party in this regard. The Court finds that this insistence is probably because the applicant has hopes of remaining in the family home and would hope to buy the respondent out with her share of the proceeds of the sale of the business. This is a somewhat understandable position. However, it is also an unreasonable position to

adopt having regard to the age and needs of both parties, the connection which they both have to the family home and its size. The applicant does not need a house as large as the family home and downsizing is a sensible approach in any event - even if there is a sentimental attachment.

52. The respondent has adopted a reasonable approach in his open letter of the 5th of October 2021 and subsequently - but the applicant has not been reasonable in her response.

53. In light of the evidence, the Court considers it appropriate to make the following orders : -

1. A Decree of Judicial Separation pursuant to section 2(1)(f) of the Judicial Separation and Family Law Reform Act 1989.
2. An order pursuant to section 15 of the Family Law Act 1995 directing the applicant and respondent to jointly sell their respective shareholdings in the “**Company**” as expeditiously as possible in the most tax efficient manner and with the combined net proceeds of sale from the sale of both shareholdings to be divided equally between them.
3. The sale of the Company is to proceed in the following manner -
 - 3.1. [Redacted financial services firm] be appointed to advise the parties in respect of the sale of the Company and to prepare the Company for sale, including the production of an Information Memorandum - such Memorandum to be completed by the 30th of June, 2022.
 - 3.2. Once a price range has been ascertained and agreed by the applicant and the respondent, D.B. is to be entitled to make an offer for the purchase of the company.

- 3.3. The applicant's and the respondent's solicitors shall be jointly instructed in respect of the sale of the Company. Alternatively, in default of agreement on this an independent solicitor is to be agreed and appointed for the sale of the company.
- 3.4. [redacted financial advisory firm] shall continue to advise and assist the Company in respect of the preparation of any accounts to facilitate the sale of the Company.
4. (a) An Order pursuant to section 10(1)(a)(ii) of the Family Law Act 1995 directing the sale of the ("**Family Home**") with the net proceeds of sale to be divided equally between the parties. There shall be joint carriage of sale as between the nominated solicitors for the parties.
- (b) The said property to be placed on the market for sale and put up for sale through [redacted auctioneers] on the 1st of September 2022. The advices of the auctioneer as to the mode of sale and the reserve are to be accepted by the parties. Any offer made for the house which the auctioneer considers a good offer shall be the subject of a recommendation of the auctioneer. The parties will accept the advice and recommendation of the auctioneer.
- (c) Both the applicant and the respondent are to be entitled to reside in the family home pending the closing of the sale of the family home.
5. A declaration pursuant to section 10(1)(b) of the 1995 Act that the joint tenancy between the parties in the family home is severed effective upon the making of this Order.

6. An order that the contents of the family home be divided equally between the parties on a turn and turnabout basis.
7. An Order pursuant to section 15 of the Family Law Act 1995 directing the respondent to sell (the “**Commercial Property**”) with the net proceeds of sale to be divided equally between the parties. The Commercial Property is to be marketed in conjunction with the sale of the Company and in the event that the Commercial Property is not sold as part of the sale of the Company, the Commercial Property will be marketed for sale thereafter. There shall be joint carriage of sale of the Commercial Property as between the nominated solicitors for the parties.
8. An Order pursuant to section 15 of the Family Law Act 1995 directing the sale of the old car with all reasonable expedition and with the net proceeds of sale to be distributed equally between the parties.
9. An Order pursuant to section 9(1)(a) of the Family Law Act 1995 directing that the balances of all bank accounts (other than €36,330.72 being the applicant’s inheritance), investments to include the EIS investment and any share holdings (other than in the Company) as between the parties be consolidated and distributed equally between the parties. It is declared that the applicant shall retain her inheritance. The proceeds of the EIS are to be distributed when the investment can be encashed or realised without penalty.
10. An Order pursuant to section 9(1)(a) of the Family Law Act 1995 directing the respondent to transfer, or arrange the transfer, prior to 1st of July 2022 to the applicant in as cost efficient a manner as possible 50% of the value of the pensions.
11. Save as otherwise provided for herein an Order pursuant to section 36 of the Family Law Act 1995 that each of the parties are the sole legal and beneficial

owner of all other assets identified in their individual Affidavits of Means sworn on 27th April, 2022 and 1st April, 2022 respectively - except that the respondent is Declared solely entitled to the yacht and his car.

12. Mutual Orders pursuant to section 14 of the Family Law Act 1995 extinguishing the share that either party would otherwise be entitled to in the estate of the other party as a legal right or on intestacy under the Succession Act 1965.
13. Mutual Orders pursuant to section 15A(10) of the Family Law Act 1995 directing that neither party shall, on the death of the other, be entitled to apply for an order under section 15A of the Family Law Act 1995.
14. Liberty to apply and/or re-enter.
- 54.** The Court will hear from both parties in relation to the costs of these proceedings.